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BEFORE THE

**Federal Communications Commission**

SEP 16 1993

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of

MM DOCKET NO. 93-42

MOONBEAM, INC.

)

File No. BPH-911115MG

)

GARY E. WILLSON

)

File No. BPH-911115MO

)

For a Construction Permit  
New FM Station on Channel 265A  
in Calistoga, California

)

)

)

**RECEIVED**TO: The Honorable Edward Luton  
Administrative Law Judge

SEP 16 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**OPPOSITION TO THIRD MOTION  
TO ENLARGE ISSUES AGAINST GARY E. WILLSON**

Gary E. Willson files this opposition to the Third Motion to Enlarge Issues Against Gary E. Willson filed by Moonbeam, Inc. (Moonbeam). Moonbeam seeks addition of a staffing issue despite the fact that Willson proposes to operate the station with at least four full-time employees, and four part-time employees. As more particularly set forth below, Moonbeam's Motion lacks merit and should be denied.

**A. Willson's Proposal.**

Willson, of course, is proposing to operate a small Class A FM station -- not a television station, or even a high-power major market radio station. He also has many years of broadcast experience operating his own station in Fresno and is familiar with the staff required to operate an FM station. He is proposing to staff his Calistoga station with four full-time

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employees and four part-time employees.<sup>1</sup> These are more employees than the Commission has already presumptively deemed sufficient to staff a Class A FM stations. See Annette B. Godwin, 8 FCC Rcd. 4098 (Rev. Bd. 1993) discussed infra. If in the remote possibility Mr. Willson considers it necessary to hire additional employees, \$28,000 has been allocated in his operating budget for miscellaneous or contingency items which could, if necessary, easily pay the salaries for additional full-time or part-time personnel.

Under Moonbeam's analysis, Willson's proposed staffing provides him with 210 man hours per week to cover 168 hours in a broadcast week. Moonbeam assumes that the station will operate 24 hours a day beginning immediately and assumes that a broadcast operation which is not automated must have on-air staff present at all times. Both assumptions are wrong. First, Mr. Willson testified the station would probably operate 24 hours per day (Tr. 260). See Ex. 1. He expects, however, that during the first 3 months of operation at least, and probably longer, the station will be operating 18 hours a day until the station "gets on its feet." See Ex. 2. This means that Willson has over 240 man hours per week available for a 126-hour broadcast week. Secondly, the assumption that there must be on-air personnel present at all times if the station is not automated is not true.

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<sup>1</sup> At hearing, Mr. Willson testified his station would have seven or eight employees (Tr. 253). He testified he would have four full-time and three part-time employees (Hearing Tr. 254). His operating budget, which Mr. Willson has since reviewed, contemplates four full-time and four part-time employees. See Ex. 2.

The station could during weekends, late night, or any time for that matter, air a multi-hour segment of all music programming through use of a reel-to-reel tape player or repeat of prior broadcasts. In this regard, Willson testified merely that he currently did not plan an automated broadcast operation. This, of course, does not mean that Willson did not plan any automation ever. He testified that, although he does not have "any present plans for automation," that "it could happen" and that "it would depend on the marketplace when the station's ready for operation" (Tr. 266). Mr. Willson has a \$28,000 contingency built into his operating budget, and another \$25,000 contingency built into his projected construction budget which can easily accommodate automation of the station and/or hiring additional staff.

Moonbeam makes a number of other unfounded assumptions as well. For instance, Moonbeam presumes that full-time employees will work no more than 40 hours week. Moonbeam assumes "no one will screen a flood of music that exists to select what the station will play; no one will write continuity for commercial and promotional announcements; no one will produce commercial and promotional announcements for on-air use; and no one will produce any kind of local or public service programming." Motion at ¶10. Moonbeam then goes on to make an even bigger unsupported assumption that, "Not even a semi-automated station can operate if these support functions are not performed." Moonbeam fails to support any of its allegations with affidavits of individuals having first-hand knowledge as required by Rule 1.229. More importantly, Willson has allocated over 114 man hours per week

(based on conservative 40-hour full-time and 30-hour part-time work weeks) to these and other station functions over and above the hours necessary to operate the station with on-air personnel the entire broadcast week. See Ex. 2. Also, there is little or no music to screen if a music service is utilized as contemplated. Many spots are not even produced by the stations airing them and there is much public service programming available on the market for purchase or barter. Willson proposes a music-intensive format which requires less staff. Moonbeam also fails to take into account the significant contributions Mr. Willson will make to the operation of the station. Mr. Willson worked at least 45-hour weeks at the Fresno station and expects that he and his other three full-time employees will work comparable hours at the Calistoga station.

#### B. The Law.

Far from raising any material or substantial question, case law supports the presumptive conclusion that Willson's staffing is more than adequate. The Commission's very recent decision in Annette B. Godwin, 8 FCC Rcd. 4098 (Rev. Bd., released June 17, 1993) is dispositive in concluding that no staffing issue should be added. The Review Board rejected the contention that a staffing issue should be added against an applicant proposing to operate a Class A FM station 24 hours a day with a total of six employees. The Review Board noted:

Fernandina also contends that Godwin's "proposal to operate her station twenty-four hours a day with only five other employees is unreasonable on its face." The Commission's threshold for a staffing issue is rather stiff, compare, e.g., Brookhaven Broadcasting Co. Inc.,

50 FCC 2d 703, 707-08 (Rev. Bd. 1975)(no staffing issue added where applicant proposed 5 full time employees) with Pepper Schultz, 103 FCC 2d 1052, 1055 (Rev. Bd. 1986) (disqualified applicant proposes to operate 24 hours per day with zero employees) (subsequent history omitted). Fernandina has not met the Commission's threshold for a staffing issue for this type Class A FM facility. See United Broadcasting Co., 93 FCC 2d 482, 511-15 (1983). (Emphasis added.)

Id. at ¶3.

Willson proposes to operate 18 hours a day with eight employees. He has a sufficient cushion of funds budgeted to hire additional full-time employees, or part-time employees, as needed. Moonbeam, therefore, is even further from meeting the threshold for a staffing issue than the applicant in Godwin whose request for a staffing issue was flatly denied.

In the even more recent case of Linda V. Kulisky, 8 FCC Rcd. \_\_\_ (Rev. Bd. August 31, 1993), the Commission denied a staffing issue against an applicant that proposed to operate with only four full-time employees an automated station that would also produce and air local public service announcements responsive to local needs in addition to promotions and advertising spots. The Commission noted that the applicant's proposal was "not facially unreasonable" or "inherently improbable" in view of "market place realities." Id. at ¶16. See also Kenneth R. Crosthwait, 79 FCC2d 191 (1980) (no staffing issue added for operation of Class A FM station proposing a 112-hour broadcast week, including 12 hours of news per week with two full-time and two part-time employees).

A staffing issue was also rejected in WFSP, Inc., 99 FCC2d 444 at ¶5 (Rev. Bd. 1984). There, an applicant, proposed to

operate an FM station 126 hours per week with a staff of four full-time employees. In its opposition to the requested issue, the applicant also indicated it would hire additional part-time employees as necessary to operate the station.

In Radio Geneva, Inc., 27 RR2d 1680 (Rev. Bd. 1973), the Review Board refused to add a staffing issue against an applicant that proposed to operate an FM facility with a staff of five full-time employees, and that proposed to devote some 18 hours a week to news, public affairs, and other programming. The Board noted, "While Buckineer proposes to devote some 18 hours a week to news, public affairs, and other programming, there is nothing inherently improbable about Buckineer's plan to operate an FM facility with a staff of five full-time employees." Id. at ¶3. See also KOWL, Inc., 31 RR2d 1589 (Rev. Bd. 1974) (denied a staffing issue against a station proposing to operate 126 hours per week, including 11.5 hours of news, 10.5 hours of public affairs, and 5 hours of other programming with five full-time and one part-time employee).

The cases cited by Moonbeam only support Willson. In Pepper Schultz, 4 FCC Rcd. 6393 (Rev. Bd. 1989), the Review Board found a staffing proposal to be "inherently improbable" since an applicant proposed to operate 24 hours per day, 168 hours per week, with no employees. The applicant was also relying on a belief that friends would help and proposed utilizing an automated transmitter system (ATS) which was flatly prohibited by Commission rules.

Moonbeam also cites Bisbee Broadcasters, Inc., 31 RR2d 71 (Rev. Bd. 1974). Again, this decision supports Willson's position. There, the Review Board denied a staffing issue against an applicant which proposed staffing the station with only two full-time employees and four part-time employees for a broadcast week of at least 120 hours. In denying the issue, the Board noted, "The Commission has no rigid rules or standard prescribing personnel or staffing requirements; there is only a general one that there be a reasonable likelihood that an applicant can effectuate its proposed operation with its staff." It noted that while the applicant's "proposal might be frugal, rigorous and demanding, the Board, in its expertise, does not believe that it is so far below the average of small market radio stations" that it must be rejected. Id. at ¶4.

Moonbeam also cites two 25-year-old decisions, Mace Broadcasting Company, 13 RR2d 753 (1968), and Clarkstown Broadcasters, 12 RR2d 1203 (1968). In Mace, a staffing issue was added where an applicant proposing a 125-hour per week schedule proposed a staff of two full-time and three part-time employees. In Clarkstown Broadcasters, the Commission added a staffing issue because "a question arises as to the ability of a three man operational staff to conduct 83 hours of weekly programming, 7.11 percent of which will be live." Id. at ¶11. These two cases are easily distinguishable. First, they are 25-year-old cases of little precedential value. Secondly, Willson proposes more staff per broadcast hour than either of these applicants.

Finally, Moonbeam cites Brookhaven Broadcasting Company, Inc., 32 RR2d 861 (Rev. Bd. 1975). The Commission refused to add a staffing issue against an applicant that proposed to use five full-time employees.

Case Summary:

Staffing issue not added:

1. Annette B. Godwin (Rev. Bd. 1993), 24-hour day, 168-hour week/6 employees.
2. Linda V. Kulisky (Rev. Bd. 1993), full broadcast week/4 full-time employees.
3. Kenneth Crosthwait (1980), 112-hour week (including 12 hours news per week)/2 full-time and 2 part-time employees.
4. WFSP, Inc. (Rev. Bd. 1984) 126-hour week/4 full-time employees.
5. Radio Geneva (Rev. Bd. 1973), full broadcast week included 18 hours week news and public affairs/5 full-time employees.
6. KOWL, Inc. (Rev. Bd. 1974), 126-hour week (including 22 hours per week news and public affairs)/5 full-time, 1 part-time employee.
7. Bisbee Broadcasting, Inc. (Rev. Bd. 1975), 120-hour week/2 full-time employees.
8. Brookhaven Broadcasting Co. (Rev. Bd. 1975), full broadcast week/5 full-time employees.

Staffing issue added:

1. Pepper Schultz (Rev. Bd. 1989), 24-hour day/168-hour week/1 full-time and volunteers.
2. Mace Broadcasting (1968), 125-hour week/2 full-time and 3 part-time employees.
3. Clarkstown Broadcasters (1968), 83-hour week/3 full-time employees.

In sum, there are no cases that support the addition of a staffing issue for a proposal like Willson's, and many that



specifically find that no staffing issue is warranted for a proposal like Willson's. Willson proposes four full-time and three part-time employees, a 126-hour broadcast week, and has funds budgeted to hire additional personnel if needed. The burden for adding a staffing issue is high. See Crosthwait, supra, at ¶17 (staffing proposal must be inherently incapable of effectuation -- mere differences in personal judgment insufficient basis to add issue). Indeed, even if Willson did propose to broadcast 24 hours a day with seven instead of eight employees, his proposal would be reasonable -- even more so since Willson has a cushion of funds available to hire additional employees. Moonbeam has made its allegations based on speculation unsupported by the type of evidence required by Rule 1.229. See WFSP, Inc., supra, at ¶5 ("mere recitation of [applicant's] proposal together with a speculative assertion that it cannot be effectuated fails to meet [standard for adding staffing issue]"). Willson has demonstrated the efficacy of his proposal.

### C. Conclusion.

No staffing issue is warranted. Willson has demonstrated:

1. He proposes to operate his station with eight employees -- four full-time and four part-time.
2. His broadcast week, at least during the first 3 months, will be 18 hours per day, or 126 hours per week.
3. Willson proposes sufficient staff to provide on-air announcers for all 126 hours of the broadcast week, plus over 114 hours per week for other station business.
4. Willson has included in his operational budget a cushion of \$28,000 which can be used to hire additional employees if necessary.

5. Willson has stated that, if necessary, he will acquire automation equipment which can be purchased with budgeted contingent funds.

There is a high threshold which must be met in adding a staffing issue. The petitioner must demonstrate that the staffing proposal is "inherently incapable of effectuation." Although not required to do so, Willson has affirmatively demonstrated the efficacy of his staffing plan. Commission precedent supports this conclusion.

WHEREFORE, it is respectfully requested that Moonbeam's Third Motion to Enlarge Issues Against Gary E. Willson be denied.

Respectfully submitted,

GARY E. WILLSON

GAMMON & GRANGE  
8280 Greensboro Drive  
Seventh Floor  
McLean, VA 22102-3807  
(703) 761-5000

September 16, 1993

[0068/C93awfp3Mbt]

By   
A. Wray Fitch III  
His Attorney

**EXHIBIT 1**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

-----)  
In Re Applications of: )

MOONBEAN, INC. )

MM DOCKET NO. 93-42

GARY E. WILLSON )

Calistoga, California )  
-----)

The above-entitled matter come on for hearing pursuant to Notice before Judge Edward Luton, Administrative Law Judge, at 2000 L Street, N.W., Washington, D.C. in Courtroom No. 4, on Thursday, July 22, 1993 at 9:35 a.m.

APPEARANCES:

On behalf of Gary E. Willson:

JAMES A. GAMMON, Esquire  
A. WRAY FITCH, III, Esquire  
Gammon & Grange, P.C.  
8280 Greensboro Drive  
McLean, Virginia 22102-3807

(703) 761-5000

On behalf of Moonbeam, Inc.:

LEE W. SHUBERT, Esquire  
SUSAN ROSENAU, Esquire  
Haley, Bader & Potts  
4350 North Fairfax Drive  
Arlington, Virginia 22203-1633

(703) 841-2345

1 accurate representation of the liabilities, as well?

2 A Yes.

3 JUDGE LUTON: Mr. Shubert, the check, Moonbeam 3,  
4 the check and the -- this financial statement, they're both  
5 really offered by Moonbeam as some evidence on the same point?  
6 Is that right? That's what you're talking about?

7 MR. SHUBERT: That's correct, Your Honor.

8 JUDGE LUTON: Okay. I just wanted to be clear.  
9 Thank you.

10 BY MR. SHUBERT:

11 Q Mr. Willson, you've been in several FCC proceedings  
12 before, have you not?

13 A Yes, sir.

14 Q And you've been a licensee of an FCC licensed radio  
15 station?

16 A Yeah.

17 Q So you're completely aware and you understand the  
18 need for accuracy in the Commission's -- in representations  
19 made to the Commission?

20 A Correct.

21 Q Mr. Willson, how many employees do you intend to  
22 utilize with your radio station?

23 A Maybe seven or eight.

24 Q And are you aware of the positions that those  
25 employees are going to fill?

1           A     Yes.

2           Q     Are those full-time or part-time employees?

3           A     Four full-time and three part-time.

4           Q     And that includes yourself?

5           A     Yes.

6           Q     Did there not come a time during the depositions  
7 that we had in June of 1993 where you indicated to me, not  
8 including the General Manager, four full-time positions?

9           A     Yes.

10          Q     Are you still going to have those four full-time  
11 positions at the radio station?

12          A     No. That was corrected to say the four included me.  
13 That was my error.

14          Q     You corrected the number. You didn't correct the  
15 position. If you would like I'll take you back to the  
16 deposition where we can review that.

17          A     Okay.

18               MR. SHUBERT: Do you have a copy of the witness'  
19 deposition?

20               MR. FITCH: What page, counsel?

21               MR. SHUBERT: Page 110, I believe it is. Oh, I'm  
22 sorry. Page -- it's either 99 or 100. It's page 101.

23               MR. FITCH: Your Honor, I don't have a copy so if  
24 you don't mind if I can --

25               MR. SHUBERT: I have a copy.

1           A     Right, with little typographic errors, yes.

2           Q     But it wasn't correct? Yes or no? This is not a  
3 hard question. Yes or no?

4           A     There were changes and there were corrections, yes.  
5 Everything I see and reviewed before it was submitted, if  
6 that's what you're asking me.

7           Q     Are you planning an automated radio operation?

8           A     No, sir.

9           Q     You're going to have a full-time operation?

10          A     Yes.

11          Q     You're going to run it 24 hours a day?

12          A     Probably.

13          Q     Are you going to be doing selling?

14          A     I will be out on the street from time to time, yes.

15          Q     Did you sell at your last radio station?

16          A     Not really. I believe as a General Manager you  
17 should be in the field and you should know your clients and I  
18 tried to assist salespeople and Sales Manager on the methods  
19 that are proper. I have a long background of sales management  
20 and sales, so my direction, my input, and I think they should  
21 see in the field the people that buy my -- buy time from me,  
22 see me in person from time to time. That's not done  
23 regularly, but I am out in the field once in awhile.

24          Q     Is it safe to say that this radio station for  
25 Calistoga you're going to operate it pretty much as you did

1 years.

2 Q Mr. Willson, will there be any kind of automation  
3 equipment at your station?

4 A I don't have any present plans for automation. It  
5 could happen.

6 Q And what would that depend on?

7 A It would depend on the marketplace when the  
8 station's ready for operation.

9 MR. FITCH: That's all I have, Your Honor.

10 JUDGE LUTON: Recross?

11 RECROSS-EXAMINATION

12 BY MR. SHUBERT:

13 Q Mr. Willson, when did you live in Michigan?

14 A Up until 1958.

15 Q So your involvement in the Chamber of Commerce in  
16 Flint was --

17 A Prior to 1958.

18 Q How about the Lion's Club you mentioned? Was that  
19 in Michigan?

20 A I can't recall. I think I was in the Lion's Club or  
21 the Elk's Club when I worked in Sacramento at either one of  
22 the radio stations or at Channel 10, probably the radio  
23 station.

24 Q You're sure that you were a member when you worked  
25 at those radio stations?



**EXHIBIT 2**

# **DECLARATION**

I, Gary E. Willson, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge and belief.

I have been in the broadcasting business nearly my entire life. I built and successfully operated a 50,000-watt FM station in Fresno, California from December 1976 to April 1981. I, therefore, feel qualified to speak to the staffing needs of my proposed station in Calistoga.

I have reviewed my operating budget for the first 3 months of operation prepared at the time I certified my application. I budgeted for four full-time employees, including myself, and for four part-time employees. In addition, I provided for a contingency of \$25,000 and another \$3,000 for miscellaneous expenses. I could, therefore, if deemed necessary, hire more full-time and/or part-time personnel. I also provided for a \$25,000 contingency in funds budgeted for construction.

I plan to broadcast initially, at least for the first 3 months of broadcast operations, 18 hours per day. I hope to eventually broadcast 24 hours per day when the station gets on its feet, which is why I testified that I would "probably" broadcast that many hours.

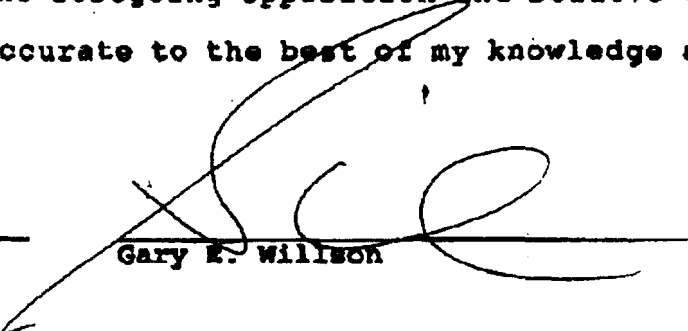
Also, although I initially do not propose an automated broadcast operation, I do plan to have some capability of broadcasting without on-air announcers by using, for example, reel-to-reel tape players to air programming or repeating segments of earlier broadcast programming. I may well use this capability during those parts of the broadcast week when there are fewer

listeners, such as late night and at certain times on weekends. Also, I have provided a sufficient cushion in my budget to fully automate the station if I choose. In any event, my staffing proposal allows for live announcers to cover my entire 126-hour broadcast week. Two part-time announcers will announce 30 hours per week each, two additional part-time employees will announce at least 20 hours per week each. I contemplate that two of my full-time employees will also have on-air responsibilities. My full-time sales manager will devote 20 hours per week to on-air duties, and my full-time office manager/bookkeeper will devote an additional 6-10 hours per week.

As General Manager of my station in Fresno, I worked an average of over 45 hours per week. I would expect to work comparable hours at my Calistoga station and would also expect my full-time employees to work approximately 45 hours per week each. I contemplate there will be more than sufficient man hours per week to operate a successful radio station, including sales, programming, finances, station management, public relations, etc. I contemplate the station will be primarily music oriented and intensive and will likely use a music service, creating even less demand on staff.

I have reviewed the foregoing Opposition and believe the facts to be true and accurate to the best of my knowledge and belief.

9-15-93  
Date

  
\_\_\_\_\_  
Gary E. Willison

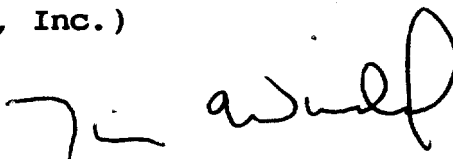
**CERTIFICATE OF SERVICE**

I, Tim Wineland, in the law offices of Gammon & Grange, P.C., hereby certify that I have sent, this 16th day of September 1993, by first-class, postage-prepaid, U.S. Mail, copies of the foregoing OPPOSITION TO THIRD MOTION TO ENLARGE ISSUES AGAINST GARY E. WILLSON to the following:

\* The Honorable Edward Luton  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, N.W., Room 225  
Washington, D.C. 20554

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\_\_\_\_\_  
Tim Wineland

\* By Hand